BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Appellate Court of Illinois in this case has not been reported. No opinion was rendered by the Supreme Court of Illinois in denying petitioner's request for leave to appeal.

The jurisdictional grounds upon which review of this case is sought are set forth on pages 3 and 4 of the foregoing petition and are herein incorporated by reference.

STATEMENT OF THE CASE.

The facts, all of which were wholly uncontradicted, are as follows:

On May 21, 1937, petitioner's southbound freight train, consisting of 86 cars, an engine and a caboose, became "stalled" while going up a long hill located about 2 miles north of Buda, on petitioner's Southern Illinois Division (R. 14, 15). The crew operating the train consisted of a conductor, head or front-end brakeman, a rear brakeman, an engineer, and a fireman (R. 14). The train was on its regular daily run. The accident happened between 9 and 10 o'clock of a dark night and in the open country. It is not uncommon for a long freight train to stall on a long hill, and every experienced trainman (and all of this crew were such) knows when it is about to happen (by the slowing up of the train against the power of the engine) and knows what has to be done about it.

The head-end brakeman (who rides in the engine between stations) gets off and goes back, or stands beside the train until the final stall, and then he takes charge of the matter (R. 51, 52).

The train must be "cut" in two, and the front part or section taken to the next place on the line where there is a sidetrack, and left there; the engine then goes back,

couples onto the rear section, hauls it to such sidetrack, and the two sections are there rejoined and the train proceeds on its way. The whole operation is called "doubling the hill" (R. 47).

There is only one proper way of performing the "cutting" part of the "doubling" (R. 53, 93). It consists of five things or steps successively, after the head brakeman selects the place (between which two of the cars) to make the cut. First, he closes the air brake angle cocks on the two cars, the one at the rear end of what will be the rear car of the front section after the cut is made and the other at the head end of what will be the head or first car of the rear section after the cut is made. Second, he uncouples the air hose between the two cars to be separated. Third, he reopens the angle cock at the head of the rear section, doing which automatically sets the brakes on each car and the caboose of that section, the effect of which is to anchor the section there until the engine, after depositing the front section of the train on the said sidetrack, comes back to get the rear section. Fourth, he steps out from between the cars, on the engineer's side, and signals the engineer to slack back, or push back, the cars ahead of the cut, so that he can "pull the pin" which means lifting the locking block of the car couplers, by means of the pinlifting lever, which extends from the coupler to the outside of or beyond the car. The pin cannot be pulled when the train is stretched out and taut. Fifth, when the slack gets back to the place of the cut, releasing the tension on the locking block, he "pulls the pin," as above described, whereupon the "cutting" is completed, he then signals the engineer to go ahead, and then the rest of the "doubling" is performed as indicated (R. 53, 93, 112). The pin cannot be pulled or the cars uncoupled until the slack gets back to the couplers where the cut is made (R. 97). The "slack" is the longitudinal play between the cars,

amounting to 10 to 12 inches between each pair of cars (R. 126).

That backward movement is not a movement of the whole train, but only of the cars ahead of the cut. When it reaches the place of the cut it is stopped by the rear section—if, as they should be, the brakes have been set on the rear section before the cars are uncoupled. Such a slack-back movement does not move the rear cars or the caboose.

As the slowing of the train, at the time in question, indicated that it was about to stall Sevier got out of the engine to inspect the cars back to the place he should select to make the cut. At once when the train did stop, the engineer reversed his engine, backed up a short distance, then put his engine in forward motion, in an attempt to overcome whatever was the difficulty, but was unsuccessful, the train, on the attempt, moving farther ahead but a short distance and then again stalling. Thereupon the engineer, by use of the engine brake, held the train standing, "stretched out or taut," for three to five minutes, watching for a signal from Sevier to slackback (take the tension off the couplers so that they could be uncoupled), got the expected signal, slacked back until stopped without his volition, watched for a further signal from Sevier. Just before the slackback movement was stopped Sevier's lantern disappeared and the engineer, after waiting for about five minutes went back to see what was the matter. Sevier was found crushed between the couplers of the 36th and 37th cars back of the engine, the place he had selected for making the cut.

In making the cut Sevier had taken all of the necessary steps in their proper order, except one. He did *not* set the brakes on the rear section before he signaled the engineer to slack back, and so, when the slack got back to the place of the cut, and he uncoupled the cars ("pulled the

pin''), the rear section naturally started down the hill (R. 48, 50, 54, 55, 62, 77, 78, 89, 90, 91, 94, 96-7, 99, 107, 112, 113, 114, 116-17).

When Sevier signaled the engineer, and thereafter uncoupled the cars and the rear section started down the hill he was outside of the cars, in a place of perfect safety (R. 53, 54, 93, 96, 97, 112-13). In order then to stop the rear section and prevent it running away, he went between the couplers of the then separated sections and set the brakes on the rear section, by opening and then closing the angle cock on the head car of that section, which angle cock was on the side of the couplers away from him, on the opposite side of the train (R. 55, 96-7, 113), and in getting to it to open it he put his body between the then separated car couplers. This he did, beyond any doubt, for after the rear section started down hill it was suddenly stopped by the setting of its brakes in emergency, which effect could only have been produced by Sevier himself, and only by his opening and again closing the air brake angle cock on the front car of that section, which was beyond the couplers on the side of the train opposite where he was when he pulled the pin (R. 16, 17, 26, 27, 29, 48, 50, 54, 55, 72, 77, 78, 89, 90, 91, 94, 96-7, 99, 107).

The air brake system on such a train as this is commonly controlled by the engineer, but where, as here, circumstances require it, control can be taken away from him by any trainman at any space between any two of the cars in the train, by closing the angle cock (there being one such on each end of each car) on the side of such space which is nearest the engine. When this is done the engineer cannot set the brakes on the cars back of that closed angle cock (R. 17, 77, 93-4, 97).

There is an independent air brake on the engine, not a part of the automatic train-line air brakes, the operation of which is confined to the engine itself (R. 111).

The "automatic air" or train-line air brakes system consists, from engine to caboose, inclusive, of a single complete air duct or air line. The part of the air line from end to end of each car is under the car and consists of a metal pipe. As the part of the air line between the cars must be flexible, there is attached to each end of such pipe an elastic hose which is capable of being clasped or coupled to any other like air hose on any other car. At the place where the air hose is joined to or with the air pipe is a valve or cock, operable by a lever outside of and atop the end of the car pipe called an "angle cock."

If a train pulls or breaks apart, without the angle cocks being closed at the point of the break, it unclasps or pulls apart the air hose at that place and that sets the brakes on every car in the train, the action moving rapidly in each direction from the point of the break. On the other hand, when a trainman is making a "cut" of the train, he has complete control of the air brakes, in both directions from the place of the cut. If he closes and then opens the angle cock nearest (from that point) to the engine the brakes on each car from there to the engine set immediately, taking control away from the engineer. If he closes and then opens, or opens and then again closes, the angle cock farthest from the engine the brakes on each car from there to the rear end of the train set immediately, leaving the engineer in control of the braking power on only the cars between the engine and the man at the angle cocks.

In other words the man making the cut (Sevier here) has complete control of the automatic braking system of the train, except that after once setting the brakes *he* cannot unset or release them (R. 112). If on a hill and he cuts the train in two before first setting the brakes on the rear section, and that section then starts to "run away," he of course should immediaely stop the backward movement of the *front* section by opening the angle cock at the

rear end of that section, the lever of which is on his side of the train, right under his hand. If he does so he may then catch the rear section and set the brakes on it without danger of getting caught between the couplers. On the other hand, if, in those circumstances, he does not stop the backward movement of the front section, but goes between the couplers to get to the opposite angle cock and set the rear section brakes he puts himself in position to be caught between the car couplers when the rear section stops and the front section catches up with it.

When the cutting is properly performed, and the brakes set on the rear section before the pin is pulled, the backing up movement of the forward section is stopped when the slack gets back to the place of the cut; *at no time is it possible for the brakeman to get between or to be injured by the car couplers* (R. 53, 54, 72, 97, 112-113).

The three "trainmen," in this case Keohane, Williams and Sevier, had had years of service together and on numerous occasions each had taken part, when acting as head brakeman in cutting stalled trains and doubling them over hills (R. 14, 28, 45, 51-2, 89, 91, 98), and Lukeman, the engineer, had worked with Sevier and the others for many years (R. 19, 23, 62, 93, 103).

ASSIGNMENT OF ERRORS.

The Appellate Court of Illinois erred:

In affirming the judgment of the Superior Court of Cook County.

In finding that negligence on the part of petitioner was the proximate cause of the death of respondent's intestate.

In failing to find that negligence of respondent's intestate was the sole, primary and efficient cause of his death.

SUMMARY OF ARGUMENT.

There was no evidence upon which the jury could properly find a verdict for respondent, and petitioner's motion for a directed verdict should have been granted.

Chicago, M. & St. P. Ry. v. *Coogan,* 271 U. S. 472;
Baltimore & O. R. R. v. *Groeger,* 266 U. S. 521;
Pennsylvania R. Co. v. *Chamberlain,* 288 U. S. 333;
New York Central R. Co. v. *Ambrose,* 280 U. S. 486;
Patton v. *Texas & Pac. R. Co.,* 179 U. S. 658;
A. T. & S. F. Ry. v. *Saxon,* 284 U. S. 458;
Chesapeake & O. Ry. Co. v. *Mihas,* 280 U. S. 102;
Toledo & St. L. & W. Ry. Co. v. *Allen,* 276 U. S. 165.

ARGUMENT.

In suits under the Federal Employers' Liability Act, if the claim is made that there is no evidence or not sufficient evidence to sustain a finding that negligence on defendant's part caused or contributed to cause the injury or death involved (*C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, bottom of p. 473) this court "*will examine the record,* and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed" (*Ibid,* middle of p. 474).

That is the claim we make. The prayer of the petitioner is that this court exercise that jurisdiction in this case and "*examine the record.*" In which event the record will conclusively demonstrate to this court that "the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death," and that the judgment should be reversed.

The following propositions of law also are well settled by this court:

(a) Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. *C. M. & St. P.* v. *Coogan*, 271 U. S. 472, middle of p. 477.

(b) If under the evidence a finding of no negligence is *as* consistent (or certainly if more so) as a finding of negligence, no jury question is presented, and it is the duty of the trial judge to direct the verdict. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524; *C. M. & St. P.* v. *Coogan*, 271 U. S. 472, 478; *Penna R. Co.* v. *Chamberlain*, 288 U. S. 333, 341.

(c) If the record leaves the matter in the realm of speculation and conjecture plaintiff cannot recover. *C. M. & St. P.* v. *Coogan*, 272 U. S. 472, 478, and cases cited at bottom of p. 478.

That the decision of the Appellate Court is contrary to each of these three rules of law is obvious, both from the record and from the opinion itself. If, for instance, as to the first of them we assume that there *was* circumstantial evidence relied upon to prove that Sevier pulled the pin during the first backward movement after the train first stalled, there is an utter failure to prove the circumstance. The proof is all to the contrary. *What happened after that first backward movement could not have happened if the pin had been pulled during it.*

As to the second and third of those rules it undeniably is as consistent—nay, much more so—under the evidence, that this death was caused without negligence on the part of the petitioner as that negligence of the engineer was its proximate cause. Nothing could be more certain than that a finding in accordance with the statement of facts by the court below would have no other basis than imagination; at the most, speculation, conjecture and guess.

In *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486, 489-90, the court said:

> "In any view of the matter, the respondent (plaintiff), upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 478, and cases cited.
>
> "The utmost that can be said is, that the accident *may* have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough. See *Patton* v. *Texas & Pacific R. Co.,* 179 U. S. 658, where, at page 663, this court said:
>
> " 'The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence * * * it is not sufficient for the employe to show that the employer *may* have been guilty of negligence —the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.' "

In *Penna R. Co.* v. *Chamberlain,* 288 U. S. 333, at p. 340, this court said:

> "There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to re-

> cover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong."

In *Atchison, etc. Ry.* v. *Saxon,* 284 U. S. 458, at p. 459, in denying recovery under the Federal Employers' Liability Act this court said:

> "Nobody saw the accident; no one can say with fair certainty how it occurred. Consistently with the facts disclosed, it might have happened in one of several ways and without causal negligence by the petitioner. * * * What occasioned this distressing accident can only be surmised. It was necessary to show causal negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement."

To support the burden of proving that negligence on the part of petitioner was the proximate cause of her intestate's death, respondent (a) read into the record pre-trial depositions of the conductor, the engineer and the rear brakeman of the train in question, and (b) introduced in evidence a number of rules found in petitioner's book of rules. When she rested her case there was no evidence in the record as to the cause of the death.

Even if conceded that every company rule introduced was violated, no causal connection between such violations and the death was shown. The Appellate Court adopted respondent's contention that petitioner should be held liable because of an alleged violation of petitioner's Rule 14 requiring that a signal to back up, given from the rear

of a train, be acknowledged by the engineer with three short whistles. In this connection it must be noted that there was no showing in the record that *any* whistle signals were required where the movement was nothing more than slacking back the front portion of the train. On the contrary, petitioner made an offer of proof to show that on a slack-back movement it is not usual or customary for any whistle signal to be given, and that there is no rule or other requirement that such a signal be given (R. 57).

Moreover, as a matter of law there is no duty upon the part of the employer to "warn" his employee of something he knows all about. Failure to warn in such a situation is not actionable negligence. Even if, in this case, a company rule required the blowing of a whistle in response to Sevier's slack back signal, blowing it would have given Sevier no information he did not already have. He needed no "warning," and the failure to whistle had no causal connection with the injury.

The only possible meaning of the whistle would be that the engineer was about to do what Sevier had signaled him to do. Such advice to Sevier would be perfectly pointless because the train was stretched taut and Sevier could not uncouple the cars until the slack got back to him; until he uncoupled the cars it was physically impossible for him to get between the car couplers; he was outside the line of the cars when he gave the signal, as well as when the slack got back to where he was making the cut, and also when he uncoupled the cars. It was only after that that he *could* get between the couplers. Certainly there was no causal connection between the failure to whistle and Sevier's going between the cars to repair his failure to anchor the rear section.

Precisely the same thing would have happened if the engineer had given the whistle response; Sevier would

have stood safely outside the cars (as he did) until the slack got back to where he was (as it did), whereupon he would have pulled the pin and uncoupled the cars (as he did) and then, because he had failed to set the brakes on the rear section, that section would have started back down the hill (as it did) and he then would have gone between the couplers (as he did) to set the brakes on and stop the rear section (which he did).

In *C. & O. R. Co.* v. *Mihas*, 280 U. S. 102, 108, the court said:

> "There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge or ground for belief, they were not required to warn him of the impending switching operation or to take other steps to protect him."

In *Toledo, St. Louis & Western R. R. Co.* v. *Allen*, 276 U. S. 165, 173, the court said:

> "There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. *Illinois Central R. R. Co.* v. *Ackerman*, 144 Fed. 959, 962. In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard or to warn or to take other steps to protect him."

The Appellate Court's opinion indicates that, while Sevier's back was turned the front section sneaked up on him. This was, of course, utterly impossible, as the slacking back made 36 separate and noisy bumps before the

slack reached the cut. Sevier could not have been unaware of it. Nor was his back turned. There is no such evidence in the case. His light was outside the cars all during the slacking back (R. 81). He could not have uncoupled the cars until the slack got back to where he was, and he *did* uncouple them, so ***must*** have been aware that the slack had come back.

The Appellate Court decision is also based on the theory, with regard to the two backward movements that after the first movement Sevier pulled the pin and uncoupled the cars; that he then signaled the engineer with his lantern that *"the train has parted;"* that thereafter without warning the engineer backed up instead of going ahead to the next siding. In other words that the engineer should have acted upon a "train has parted" signal in the same way as upon a "go ahead" signal.

As is obvious, the position so taken by the court is based upon a complete misunderstanding of the facts. The signal "train has parted" means that there has been an accident, that the train has "pulled apart" or "broken in two," without intention, the effect of which is to automatically set the brakes on every car in the train (R. 45, 60, 77, 111, 114, 119). No such thing had here occurred. No witness testified that Sevier pulled the pin (uncoupled the cars) on the first backward movement of the train. The evidence and every permissible inference from the evidence are to the contrary. *He did not pull the pin at that time.* He could not have done so without creating a condition which did not exist. If he had done so, what did happen could not have happened. It would have been physically impossible for it to happen.

If Sevier pulled the pin during the first backward movement he violated all of the rules and customs applying to a "doubling" operation.

If he had then pulled the pin the rear section would have started down hill and then when the engine was put in forward motion the front section would have gone on, instead of stalling or coming to a stop.

As to that first backward movement and the second stall the engineer was corroborated by both the conductor and the rear brakeman, both of whom were then in the caboose (R. 44) at the rear end of the train (R. 14, bottom; R. 15, last four lines; R. 16, first four lines; R. 44, R. 89 near bottom). There is no evidence or inference to the contrary.

If the train had "parted" the brakes on the rear section would have automatically set (R. 119) and could not be released at the point of the break (R. 112). A trainman can *set* the brakes from between any two cars in a train, but cannot thereafter release them (R. 112).

Assume Sevier pulled the pin on the first backward movement. It follows that when he did so the slack was "in," i. e., all of the longitudinal play between the cars was then closed together, with no openings anywhere between the car couplers. Then assume that he gave some (any) kind of a signal to the engineer, whereupon the latter either continued the backward motion, or, if it had been stopped, started another. What then? Either (a) there would not (could not) have been any opening or space between the couplers for Sevier to *get* in, or (b) there was no forward movement or a second stop or stall, or (c) there was no backward and then forward motion of the rear end of the train, such as was testified to by the engineer, the conductor and the rear brakeman. It is undisputed that that backward movement was but part of an attempt by the engineer to get the whole train started and "make" the hill without "doubling," that the effort was unsuccessful, and that the following forward movement resulted in gaining only a few feet, when the whole train again stalled (R. 125, 15,

last two lines, 16, top four lines; 18-19, 20, 26, 28, 44-5, 68-9) "stretched out and taut", in which position it was held for several minutes (R. 125) by the independent engine brake, until Sevier gave the slack-back signal to the engineer. If the pin had been pulled on the first backward movement it would have completed the "cut," and the next forward movement would have been that of the front section only, which *could not have stalled,* but would have gone on its way, as it did after this accident had happened (R. 91, bottom). That the rear section did, at some time, start down hill is not denied. If that did not happen until after Sevier's signal had been given and the engineer had backed the front section against the rear section, then the accident had happened before the rear section started back, which is utterly impossible, for it is undisputed that after the rear section started back and had gone a distance of about half a car length its automatic brakes were applied, which could not have been brought about by anybody except a *still alive* Sevier (R. 48-9, 50, 55, 77, 78).

The engineer *knew* that Sevier would be in a place of complete safety until the front section was stopped by bumping into the anchored rear section. There is no possible way in which he could have become advised of any danger to Sevier. He was operating on signals from Sevier. He would continue in honoring one until he received another, or at least until there was some indication that he should not. There was nothing abnormal or out of the usual course until Sevier's lantern had *stayed* "disappeared" for several minutes, without being used to give the next expected signal. *Then*, and not until then, was there anything to cause the engineer to suspect that all was not as it should be.

CONCLUSION.

We respectfully submit that as stated in *Atchison, etc. Ry.* v. *Saxon,* 284 U. S. 458, 459, this case is "one of a peculiar class where this court has frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted." In order that justice may be done in this case, we submit that a writ of certiorari should be granted and this court should review the decision of the Appellate Court of Illinois, First District, and finally reverse it.

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Counsel for Petitioner.

BRENNAN J. SLATER,
Of Counsel.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 573

CHARLES M. THOMSON, TRUSTEE OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY (SUBSTITUTED FOR CHARLES P. MEGAN, TRUSTEE),

Petitioner,

vs.

MARY B. SEVIER, ADMINISTRATRIX OF THE ESTATE OF ALBERT E. SEVIER, DECEASED,

Respondent.

ANSWER OF RESPONDENT AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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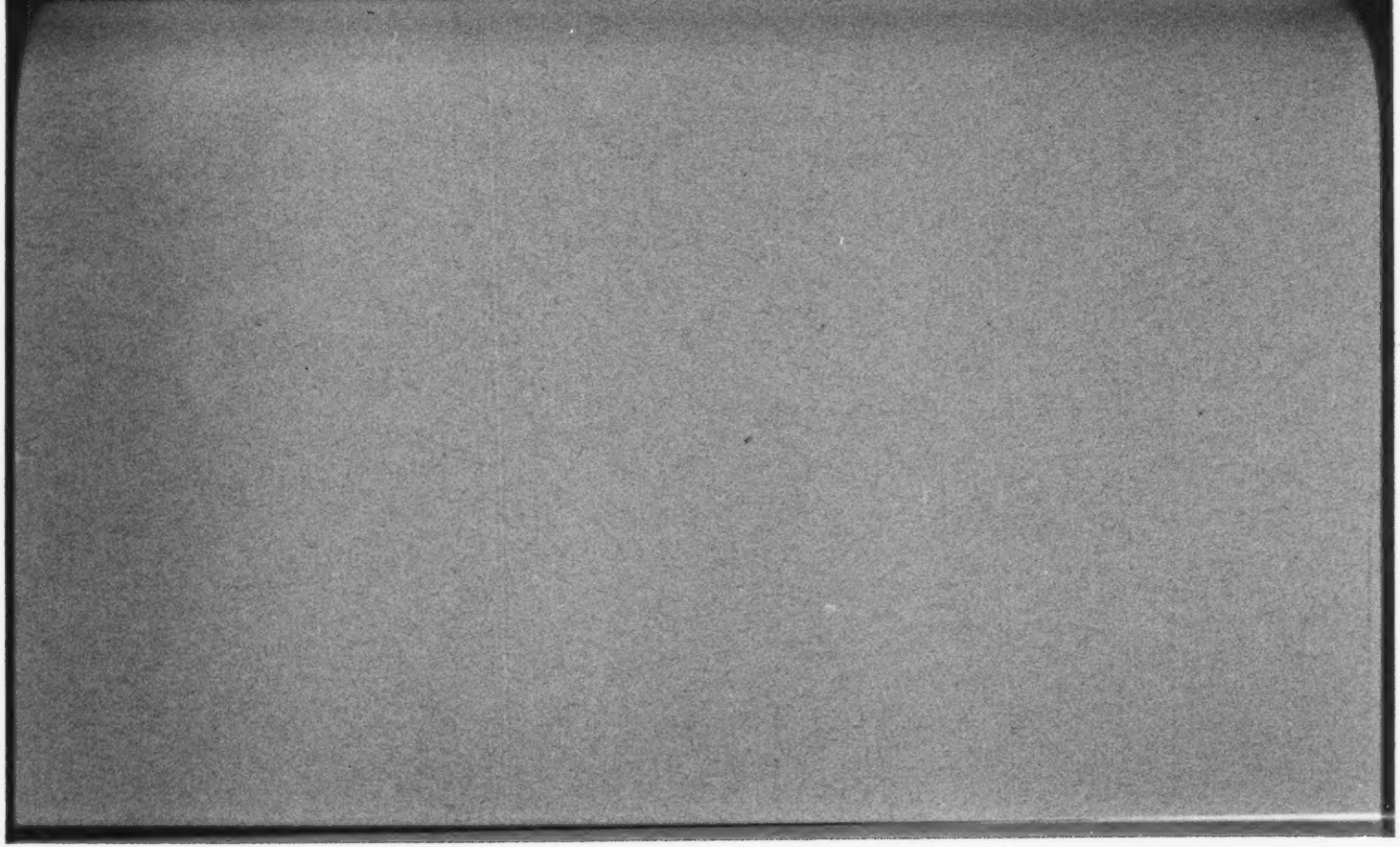

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STATEMENT OF FACTS.

This additional statement of facts is made to supply omissions and to cure inaccuracies in the statement of facts contained in the petition.

Attention is here called to the fact that there is not appended to the petition the opinion of the Appellate Court of Illinois to which the writ is sought, as required by Paragraph 1 of Rule 12 and Paragraph 2 of Rule 38, but

the opinion is inserted in the abstract. For convenience that opinion is set forth in an appendix to this answer.

No constitutional right, privilege or immunity was pleaded or involved in this case. No question was presented to or passed upon by the State Court with respect to the construction or to the applicability of any Federal statute. The applicability of the Federal Employers Liability Act was conceded. Its construction was not in dispute. The Appellate Court of Illinois for the First District, being a court of appellate jurisdiction, made no findings of fact. In affirming the judgment of the trial court based on the verdict it held that the case was one for the jury. The court said:

> "Certainly all reasonable men would not agree that the accident was caused solely by the negligence of Sevier and that there was no negligence on the part of the engineer of the train."

The Supreme Court of Illinois decided no question of law or of fact but in the exercise of its discretion denied petitioner leave to appeal.

Pertinent facts omitted from the petition for certiorari include the following:

1. The train was made up of 86 empty cars (Abst. 14, 44). It was around a pronounced curve (Abst. 156), on a grade of approximately 1% or 1 foot per one hundred feet (Abst. 36). The engine was supposed to pull 86 cars over this grade (Abst. 68). The conductor had seen trains of 145 cars go over the grade (Abst. 67). The conductor in charge of the train did not know what caused it to stall (Abst. 68). Various things can cause a train to stall, including the sticking of brakes (Abst. 82) which are held from the surface of the wheels the distance of approximately two or three thicknesses of newspaper

(Abst. 65). As the train began to slow down, obviously about to stall, the deceased inquired of the engineer whether he had better drop off and look the train over and the engineer assented (Abst. 18). The deceased thereupon got off the engine cab on the left or fireman's side while the train was still in motion (Abst. 23). After the train had proceeded about twenty car lengths it stalled (Abst. 23).

The deceased did not get out of the engine cab to cut the train or to perform a doubling operation (Abst. 22) and he had no understanding with the engineer regarding the cutting of the train, but the reason he got out was to make an inspection (Abst. 22, 82).

An inspection would require not less than ten minutes (Abst. 73). If the deceased discovered that the brakes were sticking he could remedy this situation on the spot, permitting the train to proceed on its way (Abst. 68). It was his duty on completion of his inspection to report to the conductor (Abst. 73), whose responsibility it was to determine at once, if he could, what caused the train to stall (Abst. 68).

Before the deceased could have completed the inspection of the train and within a few minutes after he got out (Abst. 83) the engineer without knowing where the deceased was, without receiving any signal, and without giving any warning, backed his engine to bunch the slack in the train (Abst. 18-23). There was an application of the automatic brakes throughout the length of the train (Abst. 16, 19, 20) and the engineer attempted unsuccessfully to go forward.

During this operation and while the tension of the draw bars was released and the cars bunched a cut could be made—that is, the train could be uncoupled and parted or separated into two sections (Abst. 23).

Sometimes trains part on grades without being uncoupled by anyone (Abst. 119-123) especially when around a curve (Abst. 71, 119) and also when an engine is backed and then suddenly reversed (Abst. 119). When this happens the pulling apart of the air hose between the cars that are thus parted releases air and sets the brakes on both of the separated sections. That is the purpose of the automatic air brake system (Abst. 119) which, operated by air pressure, keeps the brakes free or released from contact with the wheels when the air pressure is sufficient; and reduction of the air pressure causes an application of the brakes (Abst. 111). The brakes would not set instantaneously throughout the length of each section but would require an interval of some seconds (Abst. 120, 122). On this movement the engineer testified that he did go forward a few feet (Abst. 20). At some time after the train stalled the rear section of the train was observed to move back and stop by the application of the automatic air brakes (Abst. 26, 89). The defendant's rear brakeman testified that while he was walking alongside the train, the cars near him moved back and stopped "as though the engineer were attempting to start the train" (Abst. 89).

2. Defendant's engineer testified that after he made his attempt to start the train he looked back on his side of the train and saw a light. He stated he received a back-up signal (Abst. 19, 20, 22) and that a back-up signal is a signal at arm's length (Abst. 19). Defendant's signal describing a circle with the lantern held at arm's length, according to its rule 12e is not a signal to back up but is a signal that the train has parted (Abst. 157). The signal to back up is a circle at half-arm's length (Abst. 157). The only difference in the two signals is in the size of the circle (Abst. 60).

The engineer thereupon backed again without giving any signal either of warning or acknowledgment (Abst.

24), and without any application of brakes, for a distance of some twenty to sixty feet (Abst. 21) until he ran into the rear fifty cars of the train on which the automatic brakes had been set (Abst. 27) crushing Sevier to death between the couplings of the 36th and 37th cars of the train (Abst. 24, 25).

The body of the deceased was held in an erect position facing toward the rear of the train and toward the left (Abst. 103). His feet were five or six inches above the ground (Abst. 104). Neither coupler was open (Abst. 104). The angle cock on the front end of the car on the rear section was to the right of the coupler as on all freight cars (Abst. 99, 102) and to the right of deceased (Abst. 103). The deceased was left-handed (Abst. 23). Both angle cocks had been closed (Abst. 27).

3. The engineer testified that his purpose in backing was to "take the strain off the draw bars" (Abst. 20); that the cars would not move unless pushed by the application of steam (Abst. 20) and that slack between the cars was taken up by working steam against the "natural brake of the train" (Abst. 84). As he expressed it: "I had to overcome it with steam pressure because these were heavy cars and the train was partially around the curve so that if we did not have any cars coupled at all, so long as I continued to apply steam I continued to push them together" (Abst. 84). The rear fifty cars of the train were around a pronounced curve (Plaintiff's Exhibit B, Tr. 152). The effect of this was friction of the flanges of the wheels against the outer rail so that the cars around this curve did not run as freely as those on straight track (Abst. 70, 71, 130, 131). The engine and first forty cars were on straight track (Abst. 15). On the second backing movement by the engineer, which killed the deceased, the engineer backed by the application of steam, did not apply any brakes (Abst. 22) and came to a stop only because he

ran into the rear section (Abst. 21) and not by the application of any brakes (Abst. 22, 25). While he was backing he saw the light disappear (Abst. 25) but he made no effort at any time on this movement to apply any brakes (Abst. 25). He could have fully applied the brakes on the last one of the 36 cars back of the engine in about two and a half seconds (Abst. 122).

Defendant's rule 14 required that a signal to back be acknowledged by the engineer with three short whistle sounds (Plaintiff's Exhibit E, Tr. 163).

4. Men making couplings and making uncouplings go between the cars to separate the air hose and to manipulate the angle cocks (Abst. 120). The width of a freight car is at least 10 feet and the distance of the angle cock to the center line of the coupling ranges from 7 to 13 inches from the face of the coupling which is on the center line of the car (Abst. 120). It is necessary to get in between the cars to turn the angle cock (Abst. 120, 121).

If a brakeman were on the fireman's side of the train and intended to make a cut of the train he would, before getting on the engineer's side, close the angle cock on the fireman's side. After getting on the engineer's side he would uncouple the air hose and then set the brakes on the rear section by reaching over the couplers and opening the angle cock at the front end of the rear section (Abst. 107, 108). He would have quite a time reaching over them. His body would have to move along with his hand (Abst. 121).

SUMMARY OF ARGUMENT.

A. The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, and only when it follows therefrom that as a matter of law no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish.

Gardner v. *Michigan Central R. R. Co.*, 150 U. S. 349, 361;

Illinois Central Railroad Co. v. *Skaggs*, 240 U. S. 66, 69;

Union Pacific v. *Huxoll*, 245 U. S. 535.

B. The question of negligence in this case was for the jury.

1. All reasonable men would not conclude from the evidence in this case that while the engine was taking up slack (bunching or pushing the cars together by backing with the application of steam power against the "natural brake" of the cars on a 1% grade), the train was separated or parted into two sections and the rear section of fifty cars partly around a curve accelerated faster than the engine pushing the front section on straight track.

2. Every reasonable man would not have to believe from the evidence that the deceased, an experienced and careful brakeman, a married man with a large family, who was in good health and making a good salary, would and did run directly in front of the section being pushed back by the engine and between the couplers of moving cars.

3. Not every reasonable man must conclude from the evidence that the deceased ran along between two moving sections in a gap between them, also moving, opened the angle cock on the first car of the rear section, then closed it after allowing the escape of enough air to reduce the pressure twenty pounds in this fifty-car section (Abst. 16), then remained between the moving couplers (so that his body was caught facing the rear section, the angle cock being on the right side of the coupler and to his right—he being left-handed); and that all of these things occurred, although the rear section of the train moved only twenty feet.

4. All reasonable men might not conclude from the evidence that in the mind of the deceased was the certain knowledge that the engineer, more than 500 yards away in the dark, was (a) looking back, (b) observing, (c) correctly interpreting the "signal," (d) understanding that the deceased was giving a signal to "slack back," (e) that the deceased in some way knew that they were going to "double into Buda," and (f) that no acknowledgment of the signal was necessary, and that deceased therefore "assumed the risk" notwithstanding that (1) no member of the crew on this train of empty cars knew what caused it to stall; (2) the deceased went to find out what caused it to stall; (3) various different things could have been the cause, some of which could have been remedied by the deceased; and (4) sufficient time had not elapsed for the deceased to inspect the train and report to the conductor.

5. Some reasonable men might conclude that the defendant's rule that engineers must sound a warning before backing required such warning and even that in the absence of such rule reasonable care required it; it was a dark night, the train extended for over half a mile and the engineer knew that three members of the crew were somewhere on, under, or between the cars, being required to climb

from one side to the other, one of them, the deceased, having got out on the opposite side of the train for the express purpose of making an inspection.

6. It is suggested that reasonable men might reasonably accept the statement of the engineer that "these were heavy cars and the train was partially around the curve so that if we did not have any cars coupled at all as long as I continued to apply steam I continued to push them together," and that therefore the rear section could not have jumped ahead of the front section as the petitioner conjectures must have happened.

If the train could not and did not part during this second backward movement of the engine then it must have done so prior to this movement because at some time the two sections must have been far enough apart for the deceased to be between them. It is more rational to conclude that the two sections of the train separated or parted when the engineer backed the first time. This would have been possible, as stated by the Appellate Court. It was stated by the defendant's engineer that "at that time it would have been possible to cut the cars at any place after I had released that tension" (Abst. 23).

C. Accepting as true the evidence in favor of the respondent with such reasonable favorable inferences as may be drawn therefrom, reasonable men might reasonably conclude that there was negligence on the part of petitioner which contributed to the death of the deceased:

1. That the immediate, direct and proximate cause of the death of the deceased was the backward movement of petitioner's engine and the cars attached to it.

2. That such movement was made by petitioner's engineer.

3. That such movement was made without warning and in violation of petitioner's rule requiring the giving of a warning before backing an engine.

4. That ordinary care required the giving of a warning before setting in motion a long freight train on a dark night knowing that employees, including deceased, in the performance of their duties were or might be in positions of danger.

5. That petitioner's engineer backed farther than was necessary if his purpose was to take up the slack or relieve the tension in the draw bars.

6. That if petitioner's engineer had backed only the distance necessary to take up the slack to the thirty-sixth car and had then applied the automatic brakes and held the slack the deceased would not have been killed; that the testimony of petitioner's engineer respecting the signal he claimed to have received was evasive; that this witness was deeply interested in proving that the responsibility for the death of a fellow employee did not lie at his door and that his testimony, under such inducement for the purpose of showing that he received a signal justifying his action, was not necessarily true and, because of its peculiarly evasive character and other circumstances, was probably not true; that confirmation of this conclusion could be had from observation of the demeanor of this witness on the witness stand.

CONCLUSION.

It cannot be said that the State Court has decided a Federal question of substance not theretofore determined by this court. Nor can it be said that the State Court has decided a Federal question of substance in a way probably not in accordance with applicable decisions of this court.

Petitioner had a fair trial; the cause was properly submitted to the jury and no error was committed requiring a reversal of the judgment. The Appellate Court of Illinois for the First District did not err when it concluded:

> "The decisive questions presented relate to the facts, and as two juries in this case have found for the plaintiff and the verdict is reasonably consistent with the evidence, we would not be justified in reversing for a third trial."

The respondent therefore respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Certificate of Counsel.

I certify that I have personal knowledge of this litigation; that I have examined the foregoing Answer of Respondent and Brief in Opposition to Petition for Certiorari which was prepared personally by me, and that the statements of fact therein are true.

JOHN J. YOWELL.